STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2005
v	No. 249573 Oakland Circuit Court
MARIA DELCARMEN HUER MARTINEZ, Defendant-Appellant.	LC No. 2002-187114-FC

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i).[1] Defendant was sentenced to a prison term of twenty to forty years. We affirm.

Defendant first argues that there was insufficient evidence to support her conviction of possession with intent to deliver 650 or more grams of cocaine. We review a claim of insufficient evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, we will not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id*. at 561.

To obtain a conviction of possession with intent to deliver 650 or more grams of cocaine, the prosecution was required to prove the following elements: (1) that the recovered substance is cocaine; (2) that the cocaine is in a mixture weighing 650 grams or more; (3) that defendant was not authorized to possess the cocaine; and (4) that defendant knowingly possessed the cocaine with the intent to deliver. MCL 333.7401(2)(a)(i); *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992).

[1] MCL 333.7401(2)(a)(i) has since been amended to increase the statutory minimum from 650 grams to 1,000 grams. 2002 PA 665.

Because defendant acknowledges that there was sufficient evidence presented at trial to establish the other elements, she challenges the sufficiency of the evidence only with respect to the fourth element—that she possessed the cocaine, either actually or constructively.[2] Essentially, defendant argues that there was an insufficient nexus between her and the cocaine to establish constructive possession. We disagree.

"A person need not have actual physical possession of a controlled substance to be guilty of possessing it." *Id.* at 519-520. Possession can be either actual or constructive. *Id.* "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Further, one can possess a controlled substance without actually owning it, and one can possess a controlled substance jointly with one or more others. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999), citing *Wolfe, supra* at 520. However, "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Wolfe*, *supra* at 520. "Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found is insufficient to support a finding of possession." *Griffin*, *supra* at 35 (citations omitted). Rather, "constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe*, *supra* at 521. Lastly, possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence. *Id.* at 526.

Viewed in the light most favorable to the prosecution, the evidence presented at trial, considering the totality of the circumstances, was sufficient to show that defendant was more than just "merely present" when the offense occurred. Rather, it shows that defendant had constructive possession of the cocaine because she had both knowledge of its presence and the right to exercise control over it. *Wolfe*, *supra* at 520.

While defendant maintained that she arrived in Michigan in late September 2002, there was testimony that she and her boyfriend were living in the apartment as early as June or July 2002. Further, defendant and her boyfriend occupied the bedroom where both the drugs and the money were found in a duffel bag in plain view. Therefore, not only did defendant have control over the apartment, she also had control over the very room where the drugs were found.

In addition to the drugs being in plain view, which implies that defendant had knowledge of them, the officers testified that there was a strong odor of cocaine throughout the apartment, and the bedroom in particular. Further connecting defendant to the drugs was the fact that cocaine was found in her bedroom in a dresser drawer that contained women's undergarments. Despite testimony that another female resident kept some unused clothes in defendant's bedroom, including undergarments, the jury could reasonably infer that the undergarments

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[2] Defendant does not independently challenge the sufficiency of the evidence regarding her intent to deliver. However, even if she did, intent can be inferred in this case from the quantity of narcotics involved and the packaging materials found in the relevant apartment. *People v Konrad*, 449 Mich 263, 271 n 4; 536 NW2d 517 (1995).

belonged to defendant because she was the only female using the bedroom, and there was no female clothing in the room other than in the dresser. Moreover, there was testimony that defendant and her boyfriend brought the cocaine into the apartment. When viewed in the light most favorable to the prosecution, we conclude that there was sufficient evidence to find that defendant had constructive possession of the cocaine. Therefore, there was sufficient evidence to support defendant's conviction of possession with intent to deliver 650 or more grams of cocaine.[3]

Defendant next argues on appeal that she is entitled to be sentenced under the amended version of MCL 333.7401(2)(a)(i) that was in effect at the time of her sentencing. Again, we disagree. "'The determination whether a statute should be applied retroactively is a legal issue that is reviewed de novo.'" *People v Doxey*, 263 Mich App 115, 118; 687 NW2d 360 (2004), quoting *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004).

On the date of the offense, October 2, 2002, MCL 333.7401(2)(a)(i) mandated a minimum twenty-year sentence for persons found guilty of the crime of possession with intent to deliver cocaine in excess of 650 grams. However, on March 1, 2003, before defendant's conviction and sentencing, an amended version of MCL 333.7401(2)(a)(i) became effective, which eliminated the mandatory minimum sentence of twenty years, and under MCL 777.13m, the instant offense became subject to the statutory sentencing guidelines.

Defendant asserts that the amendments to MCL 333.7401 should be applied retroactively, relying on *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990) and *People v Scarborough*, 189 Mich App 341; 471 NW2d 567 (1991). However, this Court recently addressed this issue in *Doxey*, *supra* at 115, and rejected this very same argument. In *Doxey*, this Court held that 2002 PA 665 (amending MCL 333.7401) applies only to those offenses committed on or after March 1, 2003. *Doxey*, *supra* at 122; see also *Thomas*, *supra*, (finding that MCL 333.7401(2)(a)(iii) should not be applied retroactively); *People v Dailey*, 469 Mich 1019; 678 NW2d 439 (2004), (stating that defendant should be sentenced under the statutes that predate the amendments to MCL 333.7401 because MCL 769.34(2) demonstrates a legislative intent to have defendants sentenced under the law in effect on the date of the offense). In addition, this Court found that *Schultz* and *Scarborough* were distinguishable because unlike those cases, where the courts were applying the ameliorative effects of a new, identical statute, here, the amendments to MCL 333.7401 are not only ameliorative to the sentencing provisions of the statute, but they also changed the breakdown of the prohibited conduct. *Doxey*, *supra* at 120-121. Therefore, because this Court has determined that the amendments to MCL 333.7401 only apply prospectively—to offenses committed on or after March 1, 2003—we find that defendant was properly sentenced under the statute that existed at the time of the offense and before the amendments to MCL 333.7401.

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[3] Given our conclusion, we need not address defendant's argument that there was insufficient evidence to convict her on an aiding and abetting theory.

Defendant also argues that the statutory mandatory minimum sentence of twenty years under the former version of MCL 333.7401(2)(a)(i) is disproportionate because it does not take into consideration the offense or the offender. We review the proportionality of a sentence for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). "A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.*

We conclude that this argument is without merit because the statutorily mandated minimums are presumed to be proportionate and valid. *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94, mod 250 Mich App 801 (2002); *People v Arcos*, 206 Mich App 374, 377; 522 NW2d 655 (1994); *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). In addition, the factors that defendant raises in an attempt to reduce her sentence—no prior criminal record, a good work history, defendant's education, and family support—are not the type of unusual circumstances that are required to overcome this presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Next, defendant argues that the trial court made an improper upward departure from the sentencing guidelines in this case because the judge failed to state substantial and compelling reasons for a departure and he did not fill out a sentencing departure form. Again, we find that defendant's argument is without merit because when the Legislature mandates a minimum sentence for a particular offense, the statutory sentencing guidelines do not apply. MCL 769.34(5). Further, MCL 769.34(2)(a) expressly states that imposing a mandatory minimum sentence is not a departure from the guidelines.

Lastly, we reject defendant's claim that she is entitled to resentencing because the trial court was under the mistaken belief that it was unable to depart from the mandatory minimum sentence. While a defendant is entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law, *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994), defendant's argument fails because there was no mistaken belief by the trial court that it lacked discretion to make a downward departure. To the contrary, the trial court was, in fact, not authorized to make any departure in this case because MCL 333.7401(4), which previously granted courts discretion to depart in drug cases, did not apply to MCL 333.7401(2)(a)(i).

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot